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No. 89-1204

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES DEPARTMENT OF DEFENSE,
Petitioner,

v.

NATIONAL SECURITY ARCHIVE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the National Security Archive, when seeking government records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, in furtherance of its publication of document sets and other books concerning the foreign relations and national security policy of the United States, is a "representative of the news media" within the meaning of FOIA's fee provision, 5 U.S.C. § 552(a)(4)(A)(ii)(II).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 880 F.2d 1381. The opinion of the district court (Pet. App. 16a-27a) is reported at 690 F. Supp. 17.

JURISDICTION

The judgment of the court of appeals (Pet. App. 28a-29a) was entered on July 28, 1989. A petition for rehearing was denied on September 26, 1989. Pet. App. 30a. A suggestion for rehearing en banc was denied on the same day, with no judge on the court of appeals requesting that a vote be taken. Pet. App. 31a. The petition for a writ of certiorari was filed on January 24, 1990, within the time allowed by the extension of time

granted by the Chief Justice on December 19, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Respondent National Security Archive (Archive or NSA) is a non-profit organization that, among other things, collects information relating to national security and foreign policy issues, makes such information available for review at its offices without charge, and publishes such information in various formats. To carry out those functions, the NSA regularly requests information from the federal government under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. In 1987, the NSA asked petitioner Department of Defense (DOD) to recognize that it was a "representative of the news media" within the meaning of the FOIA's fee provision, as added to FOIA by the Freedom of Information Reform Act of 1986 (FIRA), 5 U.S.C. § 552(a)(4)(A)(ii)(II). Such recognition would entitle the NSA to obtain DOD documents under FOIA upon payment of duplication expenses, without also paying government costs of searching for or reviewing the documents.[1]

At the time it requested recognition of such fee status, the NSA had published a paperback book entitled *The Chronology: The Documented Day-by-Day Account of the Secret Military Assistance to Iran and the Contras*, which is a detailed, 678-page, day-by-day history of the

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[1] Requesters of information who are not entitled to preferred fee status are charged, in addition to duplication costs, the costs of searching for the documents and (if the request is for commercial use) the cost of reviewing them.

Preferred fee status is available to "educational . . . institution[s]" and to "non-commercial scientific institution[s]" as well as to "representative[s] of the news media." 5 U.S.C. § 552(a)(4)(A)(ii)(II). In addition to asserting that it was a representative of the news media, the NSA claimed that it was an educational institution. The courts below rejected that claim, and the NSA has not sought review of those rulings.

events relating to the Iran-Contra affair. C.A. Jt. App. 84. The NSA told petitioner that it also intended to publish a series of document sets on such topics of current interest as the United States' relations with El Salvador, Iran, Nicaragua, and South Africa. Those document sets would be planned by a panel of experts and would consist of materials derived not only from FOIA requests but also from interviews and private records of government officials, press releases, court opinions and records, newspaper and periodical accounts, and congressional hearings and reports. *See* Pet. App. 10a-11a. Central to the document sets would be detailed cross-referenced indices, glossaries, and other finding aids. *Id* at 11a.[2]

Petitioner denied the NSA's request for preferred fee status, even with respect to documents sought in furtherance of its publication plans. The Archive challenged the adverse decision in district court, invoking the de novo review provision concerning fee issues under FOIA. 5 U.S.C. § 552(a)(4)(A)(vii). The district court granted summary judgment for DOD, concluding that

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[2] The Archive has recently published the first of the document sets (on U.S. policy toward El Salvador), consisting of a microfiche collection of documents together with two hard-bound volumes written by NSA staff. One of the volumes (759 pages long) contains a day-by-day chronology (47 pages), descriptive glossaries of acronyms and legal measures (8 pages), glossaries of persons and organizations describing their positions, functions, and activities (32 pages), a bibliography of writings on El Salvador and related matters (16 pages), and a catalogue of documents, each entry including a thumbnail description, a listing of origin and author and date of declassification, and cross-references to index entries (624 pages). The second volume (1047 pages) contains two indices: a name index (271 pages), each entry listing the documents relating to the person and briefly indicating the role of the person in the document (named in it, signatory, recipient) and, for the more significant documents, the content; and a subject index (756 pages), each entry listing pertinent documents and containing a brief description of each document. *See* 1 & 2 National Security Archive, *El Salvador—The Making of U.S. Policy, 1977-1984* (1989).

the NSA was not a "representative of the news media." Pet. App. 16a-27a.

The court of appeals concluded otherwise, holding that the NSA was a "representative of the news media" under FOIA insofar as it sought documents in furtherance of its publication activities. Pet. App. 3a-4a, 9a-14a. Noting that the precise meaning of the statutory phrase was not "self-evident" when "[v]iewed in isolation," the court looked to the statements of the sponsors of FIRA for elucidation of what Congress meant by the phrase. Pet. App. 9a. Those statements, the court noted, revealed that Congress intended that the phrase be broadly interpreted to cover any person that "regularly publishes or disseminates information to the public." *Id.* at 11a (internal quotes omitted). In light of that legislative history, the court concluded that Congress intended "representative of the news media" generally to refer to any "person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." *Id.* at 13a.

The court of appeals then found that the administrative record makes clear that the NSA readily meets that standard. The court stated that a requester that does no more than collect documents and passively grant the public access to the resulting collection does not qualify for preferred fee status (Pet. App. 7a, 12a),[3] but it pointed out that the NSA does much more. The Archive acts, in essence, as a publisher: with respect to its

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[3] In concluding that a requester that is merely a private library or private repository of public documents—that does no more than passively "make information available" to the public—the court relied in large part on the fact that language giving preferred fee status to such requesters was included in an earlier version of the bill that became FIRA but was omitted from the bill as enacted. *See* Pet. App. 6a-7a.

document sets, it "gathers information from a variety of sources; exercises a significant degree of editorial discretion in deciding what documents to use and how to organize them; devises indices and finding aids; and distributes the resulting work to the public." *Id.* at 13a. Accordingly, the court held that the NSA is entitled to preferred fee status when it requests documents to further its preparation and publishing of the document sets. Pet. App. 14a.[4] The court concluded by stressing the key limit on its holding: it noted that its ruling might change if the Archive's plans for publication do not pan out and the Archive becomes nothing more than a private library. *Id.* at 15a.

ARGUMENT

The court of appeals' interpretation of "representative of the news media" under Section 552(a)(4)(A)(ii)(II) of FOIA is correct. No other court has adopted a different interpretation, and petitioner itself has not even been able to formulate an alternative definition of the statutory term, let alone one that is consistent with clear evidence of congressional intent, is workable in practice, and avoids substantial First Amendment problems. At bottom, petitioner's argument focuses on a single organization, the NSA, and urges that it should be denied preferred fee status because of its distinctive features. That argument, aside from being wrong, is plainly fact-bound and not worthy of this Court's review. Petitioner's efforts to portray the lower court's decision as of great practical importance are likewise unpersuasive. The petition should therefore be denied.

1. The court of appeals correctly held that "representative of the news media" was intended by Congress

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[4] The court found it unnecessary to decide how much deference was owed DOD under *Chevron USA, Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), because "the statute, read in light of the legislative history, is clear." Pet. App. 4a (citation omitted).

broadly to cover any "person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." Pet. App. 13a. The language of the statute readily supports that meaning, for the phrase can refer—indeed, it most literally refers—to any person or entity that is engaged in ("representative of") preparing presentations of material of current public interest ("the news") and distributing those presentations to the public using some channel of communication ("media"). It is true, as the court of appeals recognized, that the statutory term is not a precise one, susceptible of only one plain meaning apparent on the face of the phrase alone. Pet. App. 9a (meaning not "self-evident" when "[v]iewed in isolation").[5] But a statutory term, of course, is not properly construed by examining it in isolation and without reference to clarifying evidence of Congress's specific intent and its general aims in the statute containing the term.[6] Here, that evidence makes

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[5] Although petitioner repeatedly refers to a "plain meaning" of the statutory phrase (*e.g.*, Pet. 12, 14, 18), petitioner never once states what it believes that plain meaning to be. Indeed, petitioner effectively acknowledges that the phrase has no single plain meaning. *E.g.*, Pet. 12 (alleging that the NSA is not within the term "in any accepted meaning of that term"); *id.* at 17 ("whatever may be the precise scope of the statutory term"). Moreover, the petition surely would not be framed so tightly around the agency-deference doctrine of *Chevron U.S.A. Inc. v. NRDC, Inc.*, *supra*, if the government thought that the purely statutory question presented (Pet. I) could readily be answered without that crutch.

[6] *See, e.g., Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 108 S. Ct. 376, 381, 381-84 (1987) (noting that statutory phrase is not one "in which Congress' limpid prose puts an end to all dispute," Court states that "to acknowledge ambiguity is not to conclude that all interpretations are equally plausible" and finds "[t]he most natural reading" after analysis of legislative history and the anomalies created by other readings); *Brown v. GSA*, 425 U.S. 820, 825 (1976) ("Where the mind labours to discover the design of the legislature, it seizes everything from which aid can

clear that Congress intended the term to cover persons, like the NSA, that seek documents in furtherance of creating new works on matters of current interest that are to be actively distributed to the public.

As the court of appeals explained (Pet. App. 8a-9a), because the 1986 FIRA legislation was enacted without hearings or committee reports, the floor statements of FIRA's sponsors (Representatives English and Kindness and Senators Leahy and Hatch)—including "written explanatory materials that would have been included in a committee report" prepared by Representatives English and Kindness (132 Cong. Rec. H9463 (daily ed. Oct. 8, 1986))—are "the only authoritative indications of congressional intent." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 527 (1982). Those statements demonstrate that Congress intended "representative of the news media" broadly to cover requesters like the NSA who prepare and publish new works based on FOIA documents. Senator Leahy, stressing that "the use of the FOIA for public dissemination of information in Government files is in the public interest," explained: "[I]t is critical that the phrase 'representative of the news media' be broadly interpreted if the act is to work as expected. . . . In fact, any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a 'representative of the news media.'" 132 Cong. Rec. 27,190 (1986). Representatives English and Kindness expressed the same

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be derived.") (internal quotes omitted); *United States v. Donruss Co.*, 393 U.S. 297, 302-03 (1969) (concluding that statutory term is on its face unclear, Court finds that the legislative history reveals Congress's intended meaning); *Richards v. United States*, 369 U.S. 1, 11 (1962) ("section of a statute should not be read in isolation from the context of the whole Act"); *see also GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 384 (1980) (FOIA case: "[t]he statute provides no definition of the term 'improperly,'" but "[t]he legislative history of the Act . . . makes clear what Congress intended").

intent. "A request by a reporter or other person affiliated with a newspaper, magazine, television or radio station, or other entity that is in the business of publishing or otherwise disseminating information to the public qualifies under this provision." *Id.* at H9463 (daily ed. Oct. 8, 1986). They expressly stated that "book authors who can demonstrate that their work is likely to be published" qualify for news media status and added that "book publishers . . . automatically qualify as traditional news media." *Id.* at H9464.

Contrary to petitioner's arguments (Pet. 20-21), nothing in the legislative history contradicts those authoritative views that an entity like the NSA that prepares and publishes books based in part on FOIA documents is entitled to preferred fee status. No narrower intent—petitioner never says what this narrower intent might have been—is reflected in the deletion of language in the original House bill that would have covered persons seeking information "by or on behalf of" others (*see* Pet. 20): publishers like the NSA seek information on their own behalf, for use in preparing their own works. Nor is a congressional intent to exclude publishers like the NSA reflected in the deletion of House language that would have covered all requesters who "make the information available" to the public, even those who do no more than collect the information and then open their offices for others to inspect it (*see id.*): publishers like the NSA that create new works based on requested information and actively disseminate their works are quite different. For precisely the same reasons, exclusion of the NSA cannot be inferred from the statements of Senator Hatch that "representative of the news media" was not intended to cover "an intermediary" that was only a "private library" (*see id.* at 21), for, as the D.C. Circuit made clear (Pet. App. 15a), the only issue here is whether the NSA is entitled to preferred fee status when acting on its own behalf as a publisher, not either for someone else or merely as a library. Similarly, Sen-

ator Hatch's reference to an excluded class of "information vendors, data brokers, and other second-hand disseminators of documents" (*see* Pet. 21) does not refer to publishers, like the NSA, who seek and use the FOIA information for preparation and publication of their own works, rather than making requests simply to turn around and provide the documents they receive to others. *See* Pet. App. 12a.[7] In short, the legislative history reflects a clear congressional intent that "representative of the news media" be broadly understood to cover book publishers like the NSA; and nothing in the legislative history contradicts that broad intent, let alone contains a positive formulation of any alternative narrower meaning.

The D.C. Circuit's interpretation is supported not only by the compelling indications of specific congressional intent but also by the general aim of FIRA. The 1986 Congress enacted FIRA specifically to broaden the availability of preferred fee status, and it did so by replacing a vague "public interest" standard for preferred fee status under FOIA's pre-1986 fee provision (5 U.S.C. § 552(a)(4)(A) (1982)) with more definite standards that guarantee diminished fees to broad classes of requesters. *See* 132 Cong. Rec. H9465 (daily ed. Oct. 8, 1986). The D.C. Circuit's broad and definite construction, unlike petitioner's seemingly narrow and ill-defined approach, furthers Congress's aim in FIRA. Significantly, the court of appeals' ruling also thereby promotes FOIA's general "goal of giving the public access

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[7] There was some disagreement between Senator Hatch, on the one hand, and Representatives English and Kindness, on the other, over whether certain kinds of "information vendors" were entitled to preferred fee status. *See* 132 Cong. Rec. H9464 (daily ed. Oct. 8, 1986) (latter state that vendors such as computerized information services were covered). But, as the court of appeals observed (Pet. App. 9a), there was no disagreement about publishers like the NSA.

to all non-exempted information." *United States Dep't of Justice v. Tax Analysts*, 109 S. Ct. 2841, 2849 (1989).[8]

2. Petitioner, rather than formulating and defending an alternative definition of who is a "representative of the news media," makes several attempts to say who is *not* within the term—first, suggesting (though never quite asserting) that book publishers are not covered, and second, arguing that certain specific characteristics of the NSA exclude it from coverage. Pet. 16-17. The government's inability to formulate an alternative to the D.C. Circuit's reading is itself telling support for the court's reading. Moreover, a narrowly focused plea from the government that a single particularly active FOIA requester should be excluded from preferred fee status plainly is not an appropriate candidate for certiorari. In any event, consideration of petitioner's arguments only reinforces the court of appeals' ruling, for those arguments demonstrate that there is no sound alternative interpretation of the statutory phrase.

The statute cannot sensibly be construed to exclude book publishers and authors. DOD's position would mean that a requester who seeks information about arms control policy from an agency in order to prepare a magazine article or a television documentary would qualify for preferred status, while a requester who seeks the

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[8] This Court has often stressed "the fundamental principle of public access to Government documents that animates the FOIA," not least in recognizing that exemptions to disclosure are to be narrowly construed. *See John Doe Agency v. John Doe Corp.*, 110 S. Ct. 471, 475 (1989). The same principle, and rule of construction, should apply in the present context, supporting a broad reading of Section 552(a)(4)(A)(ii)(II) to cover all persons who collect and digest government information for the publication of new works based on that information, whatever the form of publication. Any narrower reading, especially one without intelligible standards, would deter requests by raising the costs. That result, apparently, is precisely what petitioner urges (Pet. 24-28), but it would be flatly contrary to Congress's aim of increasing use of FOIA.

identical information from the same agency in order to write a book would not. In many cases, however, a requester cannot and will not know until he receives the requested information whether a broadcast, a magazine article, or a book is the appropriate medium for disseminating the information; and it is quite common, of course, for the same material to appear in both book and magazine forms. Congress surely did not intend to compel premature decisions about publication formats or to make a requester's status turn on whether serial rights are secured in advance for a planned book.[9] Obviously, too, the category "book" is hardly precise, and the distinctions between "books" and other types of publications are increasingly blurry.[10] Page size, thickness of cover, type of binding, schedule of publication, and other matters of format are entirely irrelevant to Congress's purposes in FIRA (whereas they might be relevant in other contexts, such as postage rate or election regulation); and they provide no workable standards for application of the fee provision.[11]

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[9] Books—*e.g.*, John Hersey's *Hiroshima*, Frances Fitzgerald's *A Fire in the Lake*, Jonathan Schell's *The Fate of the Earth*, Lincoln Caplan's *The Tenth Justice*—are often serialized in whole or in part in magazines such as *The New Yorker*. In the case of the Hersey book, in fact, the entire August 31, 1946, issue of *The New Yorker* was devoted to printing it. Differences in format between the magazine issue and the book (page size, binding, advertising, type of paper) surely cannot be significant for purposes of FIRA.

[10] How does one categorize a monograph in a series or a pamphlet? a publication like the annual hardbound *Supreme Court Review*? a book-like publication that carries advertising, is not listed in *Books in Print*, and is distributed chiefly through subscriber lists (*see, e.g.*, W. Greider, *The Trouble With Money*)? an annual publication like *Jane's Fighting Ships*? the annual *Almanac of American Politics*? Amnesty International's occasional reports on human rights abuses?

[11] As the Archive noted below, any effort by Congress to draw a distinction between books and newspapers or magazines in the context of preferred status for FOIA fee exemptions would raise serious First Amendment issues. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

Petitioner's list of particular alleged characteristics of the NSA's publications likewise furnishes no basis for a narrower reading of "representative of the news media" that is both workable and consistent with congressional intent and First Amendment values. Pet. 17. First, DOD says that the NSA's document sets and indices will not be released on a "regularly scheduled basis." It is undisputed, however, that the NSA does plan regular publication, although not on a fixed schedule. Moreover, a regular schedule of publication is irrelevant under FIRA: otherwise, the fee provision would exclude most television documentaries, articles by free-lance journalists,[12] and books. Second, DOD states that the Archive's document sets and indices will not be "broadly disseminated" and will not be "of the broad and immediate public interest typically associated with the news or be readily comprehensible by typical consumers of the news." Pet. 17. But even aside from the fact that the chronologies, glossaries, and indices contained in the Archive's books will in fact be of interest to significant subsets of the public, DOD's criteria are patently improper. Many specialized newsletters, scholarly journals, and foreign language publications are neither broadly disseminated to the public nor readily comprehensible to the average American, yet clearly qualify for preferred news media status. And any construction of FIRA that asked the government to make fine distinctions based on the size of the audience or on the breadth of public interest in the publication would obviously be suspect under the First Amendment.[13] Third, DOD says that

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[12] It is uncontested that free-lance journalists who can demonstrate that they expect to be published qualify for preferred fee status. *See* 32 C.F.R. § 286.33(e)(7)(i).

[13] The First Amendment problems would arise not only from the government's role in line-drawing, but also from the effect of lines that excluded small or less accessible publications. Publications that espouse unpopular views and publications that contain highly detailed and sophisticated analyses of government agency activities are likely to have modest circulations. FIRA should not

the price of the NSA's publications distinguishes them from the reasonably affordable channels for receiving news. But many newsletters, as well as magazines such as *National Journal* or *Congressional Quarterly*, are comparably priced.[14] In any event, price is wholly irrelevant to FIRA's purposes, and using it as a criterion, like using audience size as a criterion, would involve constitutionally suspect and unworkable line-drawing.

Petitioner also asserts, in its list of particular characteristics of the NSA, that the Archive "does not exercise the sort of editorial judgment ordinarily required of the media." Pet. 17. That assertion hardly merits this Court's review, however, because it does not challenge the court of appeals' interpretation of FIRA but only the court's application of that standard. In any event, the court of appeals' express finding that the NSA does exercise a publisher's editorial judgment (Pet. App. 10a-12a) is not only patently uncertworthy but correct. The Archive, by gathering information from a variety of sources, exercising a significant degree of editorial discretion in deciding what documents to use and how to organize them, and devising detailed chronologies, indices, and finding aids, exercises precisely the sort of editorial judgment ordinarily required of the media—indeed, more editorial judgment than was required of The New York Times when it published the *Pentagon Papers*.

In short, none of the characteristics of the Archive's publications takes them outside the ambit of the statutory

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needlessly be construed to grant a government agency the ability to deter requesters from such publications from seeking information about the agency's own activities.

[14] The *National Journal* costs $589 a year. The *Congressional Quarterly* costs up to $1,000 a year. Washington Post, Feb. 8, 1990, p. B8. The Archive projected that a document set plus index would cost $1,000 and that the index alone would cost $350. C.A. Jt. App. 34. The El Salvador document set costs $3,900 and the two-volume index alone costs $900.

term. Congress intended to confer news media status on any entity that gathers information of potential interest to a segment of the population, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The court of appeals' reading of FIRA reflects that intent; the unworkable, constitutionally suspect, fine distinctions that DOD proposes do not.[15]

3. As a final argument that the court of appeals was wrong, petitioner falls back on a claim of deference to DOD's regulation, relying on *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). Pet. 12, 14-15. That argument fails for at least two independently sufficient reasons. First, as the court of appeals held (Pet. App. 4a), deference on a pure question of statutory meaning is not warranted where, as here, analysis "employing traditional tools of statutory construction" clearly reveals Congress's intended meaning. *Chevron*, 467 U.S.

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[15] Despite petitioner's contrary suggestions, it is irrelevant that the NSA is a library as well as a publisher. The court of appeals held that the NSA has preferred fee status only insofar as it seeks documents in furtherance of its publication activities, not simply "to establish and build its private collection of government records." Pet. 12. Under FIRA, a publisher plainly does not lose its status as a "representative of the news media" because it engages in non-publishing activities as well. *See* 132 Cong. Rec. 27,190 (1986) (Senator Leahy: "[S]ome organizations publish magazines or periodicals in addition to carrying out other functions. Certainly, American Legion magazine, Common Cause magazine or Consumer Reports are 'representatives of the news media,' even though their parent organizations engage in activities other than publishing magazines."); *id.* at H9464 (daily ed. Oct. 8, 1986) (Representatives English and Kindness: while "a request from a public interest group falls under the third [non-preferred] fee category[,] . . . a request from a reporter or writer for a general circulation magazine published by the public interest group would qualify under the second [preferred] fee category for news media. A request for information that is sought for possible publication is still a request from the news media, even though the public interest group might also want the information for other purposes.").

at 843 n.9; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-47 (1987); *see Dole v. United Steelworkers of America*, No. 88-1434, slip op. 8, 15-16 (Feb. 21, 1990). "If the intent of Congress is clear, that is the end of the matter." *Chevron*, 467 U.S. at 842-43.

Second, and in any event, DOD's regulation plainly does not exclude the NSA from the category of "representative[s] of the news media."[16] The regulation provides:

> The term "representative of the news media" refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. These examples are not meant to be all-inclusive.

32 C.F.R. § 286.33(e)(7)(i); *see* Pet. 3. Contrary to petitioner's assertion (Pet. 15), the Archive quite plainly is "organized and operated to publish . . . information that is about current events or that would be of current interest to the public," although it is also organized and operated for other purposes.[17] And while the regulation

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[16] The district court was incorrect when it stated that the NSA did not contest DOD's determination that the Archive fell outside the regulation. Pet. App. 20a. The Archive conceded only that it was not an "educational institution" with the meaning of DOD's regulation, which restricts the term to schools. *See id.* at 4a. At no point in this litigation has the Archive conceded or otherwise stated that it is outside the regulation's definition of "representative of the news media."

[17] Neither the statute nor regulation requires that an entity be *exclusively* organized and operated to publish news in order to

cites broadcasters, newspapers, and magazines as examples of news media, they are only examples: the regulation expressly states that the examples are not intended to be all-inclusive. Accordingly, deference to the regulation, even if appropriate, would not aid petitioner's case, because the regulation does not deprive the NSA of preferred fee status.[18]

4. In urging review of this fact-bound case, petitioner does not cite any opinion of any other court—or, indeed, of any judge on the D.C. Circuit itself—expressing a different view of the proper construction of Section 552 (a)(4)(A)(ii)(II). Rather, DOD argues that review is needed to prevent certain adverse consequences that allegedly will follow if the decision below is allowed to stand. Pet. 24-28. Those allegations, however, to the extent they involve any consequences other than precisely what Congress intended, are not supported by the record and make little real-world sense. If problems arise in the administration of the FIRA scheme, they are appropriately left for Congress to address.

DOD suggests first that the Archive should be denied preferred fee status in order to prevent an increased bur-

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qualify for preferred fee status. *See* note 15, *supra*. Of course, the court of appeals held that the NSA was entitled to such status only insofar as it sought documents in furtherance of its publication activities. Pet. App. 15a.

[18] Petitioner does not even ask for deference based on its interpretation of its own regulation. Any such deference would, in any event, be improper. Congress provided that, in reviewing fee waiver cases, "the court shall determine the matter de novo" on the basis of the administrative record. 5 U.S.C. § 552(a)(4)(A)(vii). Even if that provision would not preclude deference to a clear valid regulation adopted through proper rulemaking procedures, it does bar deference to an ad hoc agency interpretation in applying a regulation to a particular requester. In addition, DOD's position would violate the congressional directive that "doubts should be resolved in favor of the requester." 132 Cong. Rec. H9463 (daily ed. Oct. 8, 1986) (joint analysis by Reps. Kindness and English).

den on the agencies and on the Treasury. Pet. 24-26. But an increased number of FOIA requests is just what Congress envisioned.[19] In any event, reversal of the D.C. Circuit's ruling is not likely to diminish the alleged burdens, for the record in this case strongly suggests that if the Archive is compelled to forego making many requests for documents relating to crucial foreign policy and national security issues, other requesters such as newspapers, magazines, or universities, incontestably entitled to preferred fee status, will step in and make those requests. Thus, in its submission to DOD, the Archive listed more than 50 representatives of educational institutions and 80 newspapers, magazines, and broadcast stations that have requested information and assistance from the Archive. C.A. Jt. App. 60-61, 68-69. It is simply fanciful to believe that those and similar preferred fee requesters will not themselves request documents on such timely issues as American relations with Nicaragua or South Africa if the Archive is disabled from doing so.

DOD also suggests that the Archive's requests will disadvantage other requesters by delaying processing of their requests. Pet. 27. This argument—which could be made, of course, about any expansion of requesters' rights under FOIA—has no support in the record. Moreover, it ignores the fact that the Archive's requests in connection with its publication activities may lead other persons not to make FOIA requests for the same documents. The hundreds of educational institutions, newspapers and broadcasters, public interest organizations, and congressional offices that have used the Archive (*see* C.A. Jt.

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[19] As Representatives English and Kindness stated, "it is apparent that the effect of the changes in fee and fee waiver policies will be to increase use of the FOIA by the press and by public interest and other non-profit organizations as well. An increase in government oversight by these groups with less interference in the disclosure process by the political or bureaucratic processes of government is fully intended." 132 Cong. Rec. H9465 (daily ed. Oct. 8, 1986).

App. 60-61, 68-73) certainly do not regard themselves as disadvantaged because of the Archive's requests. In any event, agencies can develop and have developed techniques to ensure that large requesters do not so overburden agency reviewers as to prevent other requesters from obtaining documents. The FBI, for example, has divided requests into difficult and simple requests, identified respectively as "project requests" or "non-project requests," and handled by separate staffs. *See Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976). Such methods can guarantee fair processing of all requests.

Finally, DOD claims that other organizations not traditionally considered members of the news media have invoked the decision below in efforts "to form a private library or repository of government records at government expense." Pet. 26-27. But the decision below does not sanction such efforts. The court of appeals expressly held that a library or private repository does not qualify for preferred news media status. Pet. App. 6a-7a, 12a. It recognized the Archive's preferred fee status only "by reason of its publication activities," and it went out of its way to emphasize that if the Archive's intention to publish works based on FOIA documents does not pan out, the Archive might lose its news media status. Pet. App. 15a. Thus, in requiring that FOIA requests be connected with publication activities like the NSA's, the court of appeals provided no comfort to those simply seeking records for their private libraries.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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